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DIRECTOR

September 23, 2002

Mr. James L. Connaughton, Chairman
Council on Environmental Quality
NEPA Task Force
PO Box 221150
Salt Lake City, UT 84122

Dear Mr. Connaughton:

Thank you for the opportunity to provide recommendations to the Council on Environmental Quality (CEQ) to improve federal agencies' ability to fulfill their responsibilities under the National Environmental Policy Act (NEPA). As a State agency, we offer these comments in the context of NEPA as a barrier to the State's ability to manage natural resources using federal aid. Limited financial resources and personnel make it essential that available resources be concentrated on those proposed federal actions affecting the human environment that are truly in need of further analysis. While NEPA was enacted to ensure environmental review of major federal actions that affect the human environment such as highway construction, major dams, power facilities, etc., inordinate review and documentation is being spent on routine projects designed to improve fish and wildlife habitat.

We note that CEQ is essentially repeating a process done 20 years ago when they attempted to improve efficiency by issuing a guidance document in 1983. It is apparent that some federal agencies and personnel are apparently unaware of or have forgotten guidance previously provided by CEQ. While we laud any improvement of efficiency in government, we do not believe that improved use of technology or improved "efficiencies" will have the ultimate effect of improving the NEPA process to the degree needed or intended by CEQ.

In order to maintain the intended purpose of the NEPA, we recommend the following actions be taken by constructing clear guidance and language to: _____

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1. Determine what constitutes a significant impact on the human environment.

We reassert our belief that NEPA will be most effective if environmental analysis is concentrated on those activities that have shown a significant impact on the human environment. Broader application of categorical exclusions will allow this to occur. Exceptions to categorical exclusions (CATEX) must be limited to "extraordinary circumstances," but are increasingly employed in ordinary circumstances to limit the use of categorical exclusions by federal agencies seeking to avoid litigation.

While many of the CATEXs have direct utility for the states receiving federal aid, the current Department of Interior (DOI) / Fish and Wildlife Service (FWS) CATEXs do not adequately address the unique situation of states' resource management programs. States receiving Federal Aid in Fish and Wildlife Restoration funds are required to maintain facilities constructed or acquired with those funds. They must also manage land acquired with Federal Aid in a manner consistent with the purposes for which they were acquired (50 CFR 80). Most states agreed to these stipulations over 30 years prior to the implementation of NEPA. Additional categorical exclusions need to be defined for routine state management actions that states are required to conduct in order for the state to remain in compliance with Federal Aid rules. The 40 CFR 1507.3 supports the promulgation of CATEXs specifically for Federal Aid. It reads in part:

"Sec. 1507.3 Agency Procedures. (a)..."When the agency is a department, major subunits are encouraged (with the consent of the department) to adopt their own procedures. Such procedures shall not paraphrase these regulations...."

1. What information, data studies, etc., should be required as the basis for establishing a categorical exclusion?

It is clear that providing "guidance" to federal agencies is not as compelling a reason for employment of CATEXs, as is the fear of litigation for requiring non-federal agencies receiving Federal Aid to prepare needless environmental documentation. Experience has shown these projects benefit the human environment and contribute to the quality of life. CEQ must direct federal agencies to make more rather than less use of CATEXs through revised implementing rules. Court decisions support a federal agency's ability to interpret agency rules and guidance. We recommend that federal agencies be directed to use more CATEX and provide broad definitions of the inclusiveness of CATEXs.

We recommend that all Environmental Assessments (EA), Notices of Intent (NOI) and Findings of No Significant Impact (FONSI) issued by DOI agencies be available online and categorized as to the general types of action(s) proposed. A comparison of those actions for which a FONSI is prepared to those for which an Environmental Impact

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Statement (EIS) is prepared may then serve as a basis for establishing additional CATEXs. The process outlined in 1 above could be extended to include all federal agencies. CATEXs developed by other federal agencies are by definition appropriate for inclusion by all other federal agencies.

2. *What points of comparison could an agency use when reviewing another agency's use of a similar categorical exclusion in order to establish a new categorical exclusion?*

By definition, a categorical exclusion is an action that individually or cumulatively does not have a significant impact on the human environment. It would follow that **all** CATEXs have application across departmental lines irrespective of the agency mission. We recommend that agencies within the same department begin by reviewing CATEXs promulgated for those other agencies to determine if those CATEXs have utility.

3. *Are improvements needed in the process that agencies use to establish a new categorical exclusion? If so, please describe them.*

We are unaware of any established process within DOI/FWS for establishing new CATEXs. We recommend that DOI/FWS be directed to design and implement a process to do so. Specifically, federal agencies administering Federal Aid to the states need to solicit proposed CATEXs from the states. Such a process should allow for CATEXs specific to state grant programs. Deference needs to be given to the states for their constitutional authority to manage state resources.

2. Provide guidance on the scope and documentation required under NEPA:

Courts are increasingly becoming the final arbiter of environmental decisions made by agencies charged with resource management. This threat of court action forces federal agencies as well as those seeking a federal action that evokes NEPA to expend limited project funding for NEPA review of long standing resource management projects or defend decisions already properly documented through NEPA. The threat of a lawsuit makes it more likely that federal agencies will require excessive NEPA documentation. Now NEPA is often used by opponents of resource management projects to force project cancellation by threatening legal action.

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The largest barrier to meaningful NEPA review is the sheer volume of environmental documents currently prepared. This volume is due in part to the fear that federal agencies have of lawsuits filed for inadequate NEPA compliance. The NEPA process often becomes an unproductive effort to document steps followed, rather than a tool for making better decisions. This dilutes NEPA and results in an increasing tendency by DOI/FWS to "federalize" state activities by invoking NEPA for what are essentially state resource management actions conducted under the authority conferred to the states by Amendment X of the Constitution. We believe the spirit and intent of NEPA will be better served by concentrating effort on those major federal actions truly having a significant impact on the human environment.

3. Provide consistent NEPA compliance within federal agencies and between federal agencies:

The vague implementing rules result in unequal application of the NEPA process. The Pittman-Robertson Act (PR) funds wetland management activities in Kansas that are properly CATEXed further NEPA review, while the FWS decided that identical management in Michigan would require an EA. Contrary to NEPA's purpose "*not to generate paperwork—even excellent paperwork—but to foster excellent action,*" 40 CFR 1501.1(c), Michigan was prevented from using PR for its most important purpose, wildlife management and restoration. It is incumbent upon CEQ to ensure that extraordinarily successful resource management programs, such as PR, are not stifled and eventually crippled by NEPA.

States are also caught between federal agencies' implementation of NEPA. Such was the case in Michigan where a proposed land exchange involving Federal Aid funding required NEPA compliance. An EA was prepared by the airport authority who desired the exchange and was reviewed and approved by the Federal Aviation Administration, only to have the FWS determine the EA was insufficient to approve the exchange.

Additional Areas for Consideration:

Federal and Inter-governmental Collaboration

Limited finances and staffing prevent state agencies from participating effectively as a cooperating or joint lead agency for review of proposed federal actions. Resources expended by state or local agencies to cooperate with federal partners essentially results in the cooperating agency having less ability to carry out their own mission. We recommend that funding be earmarked within the budget of the federal agency proposing an action and used to enable the appropriate state and/or local agencies to participate in the cooperation desired by CEQ. We also note that despite guidance issued by CEQ, federal resource management agencies are slow to request state

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agencies to be a cooperating agency. Regulations for Implementing NEPA Section 1501.6(b)5 Cooperating Agencies needs to be revised to encourage cooperating agency participation.

Environmental Assessment Documents

It is our observation that federal agencies are increasingly likely to require states receiving federal grant monies to prepare an EA for actions that are appropriately CATEXed. This is particularly true if there is any opposition to a state project proposed for federal funding. The mere fact that there are those opposed to a project (e.g. managed hunting) cannot continue to be the basis for requiring an EA or EIS. The threshold for determining controversy needs to be based on **scientific** inconsistencies, not philosophical disagreement.

The fact that an EA was intended to be a concise document whose main purpose was to determine if an EIS was warranted has become lost. Federal agencies often use an EA as their main planning tool; this is not the case with most states. This leads to a tendency to require federal grant recipients to prepare an EA for proposed actions that are properly CATEXed.

EAs should **not** be required for resource management projects of long standing. Gradual management changes resulting from applying adaptive management strategies should not trigger the need for an EA. The need to produce an EA may actually serve to stifle development of better resource management. The trigger for environmental analysis should be limited to major changes in management or resource use.

Endangered Species

DOI/FWS is directed to take all practical means to restore threatened and endangered species, yet state projects designed to benefit listed species are hamstrung by an endless litany of paperwork before projects can begin. The unintended result is that many projects that would benefit listed species are never undertaken because limited resources have to be directed to those areas requiring less administrative overhead. More progress toward species recovery would be made if DOI/FWS took a more cooperative and participatory role in the preparation of the documents they require of the states.

Programmatic Analysis and Tiering

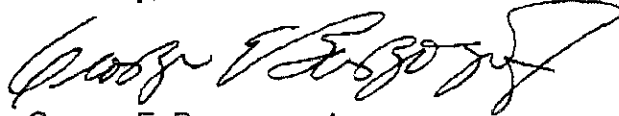
Programmatic analysis and tiering, when done for Federal Aid, should have as one of its goals the elimination or reduction of the environmental analysis required to be prepared by the states for their proposed actions.

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The mere availability of improved technology for information synthesis and or retrieval will not by itself assure better decision making. Proper application of NEPA will require consistent application of objective criteria. While we believe it essential that CEQ reemphasize the NEPA guidelines directing federal agencies to reduce needless environmental analysis, it is unfortunately evident that should CEQ limit its action to providing further guidance, NEPA will continue to smother long standing successful resource management programs.

We believe it is crucial that CEQ direct federal agencies to revise current NEPA implementation rules to include more clearly defined and broader categorical exclusions, particularly for federally funded state activities. Federal agencies must also be directed to be diligent in the application of CATEXs to federal approval of DOI grants to the states for natural resource management. Finally, it is essential that CEQ revise NEPA implementing regulations to remove the ambiguity that plagues NEPA and leads to unequal application based upon the vagaries of what opposition to proposed actions may occur.

Sincerely,



George E. Burgoyne, Jr.
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CQ563



Department of Natural
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Fax Cover Sheet

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Number of pages including cover sheet: 7

Message

This is a second try to send the fax that arrived blank yesterday. These comments were also submitted electronically on Sept. 23. Thank you!